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BEFORE
THE PUBLIC SERVICE COMMISSION
OF SOUTH CAROLINA

In the Matter of Consideration of Regulations Regarding the Designation of Eligible Telecommunications Carriers	)))	**2006-37-C**

COMMENTS OF HARGRAY WIRELESS, LLC

Hargray Wireless, LLC ("Hargray"), by its counsel, hereby submits these Comments in response to Notice of Drafting filed February 8, 2007, in the above-captioned matter.

I. INTRODUCTION

Hargray believes the Commission's draft rules generally promote the FCC's objective of establishing a uniform set of criteria resulting in a predictable universal service support mechanism for both incumbents and competitors. Rather than adopting a baseline level of regulation for states to build upon, the FCC encouraged states to require carriers "to meet the same conditions and to conduct the same public interest analysis outlined in this Report and Order."[1] In fact, the FCC emphasized that states should not impose new requirements on competitors unless such requirements are "necessary to further universal service goals."[2] The FCC also cautioned states against imposing wireline-style regulation on competitors, agreeing with the Joint Board's recommendation that "states should not require regulatory parity for parity's sake."[3] A set of rules that is largely based on the FCC's guidelines and applicable to

[1] *Federal-State Joint Board on Universal Service, Report and Order*, 20 FCC Rcd 6371, 6396, para. 58 (2005) ("*FCC ETC Order*").

[2] *Id.* at 6384, para. 30.

[3] *Id., citing Federal-State Joint Board on Universal Service, Recommended Decision,* 19 FCC Rcd 4257, 4271, para. 34 (2004).

both incumbents and competitors will promote these important objectives.

The Draft Goals are generally consistent with the FCC's guidelines and will further the goals of the 1996 Act. In this regard, Hargray offers only very limited suggestions for clarification or modification. For example, the two-year service quality improvement plan requirement should clarify that carriers are not required to achieve ubiquitous network coverage at the end of two years. Also, competitive carriers should be allowed to use, as an alternative, a more technologically neutral geographic area, such as counties, for purposes of the two-year plan. Another provision that may be clarified is the local usage comparability rule, to incorporate the FCC's total-service approach to comparing competitive and incumbent rate plans. Finally, the equal access provision of the Draft Rule should be changed to recognize that only the FCC has the authority to order wireless carriers to provide equal access.

II. DISCUSSION

A. The Draft Rule Requiring a Service Quality Improvement Plan Is Appropriate, Subject to Two Important Modifications.

The Draft Rule properly follows the example of several other states by adopting the FCC's network construction reporting requirement with a two-year horizon instead of five years. Hargray believes this approach recognizes the difficulty of planning network investments beyond two years while ensuring the Commission has the means to verify whether an ETC is using its support appropriately.[4] At the same time, Hargray believes the final rule should incorporate two important changes that would clarify an ETC's obligations and make the rule more competitively neutral.

[4] *See* Hargray Comments at pp. 8-10.

1. The Rule Should Clarify That The Two-Year Plan Is a Rolling Requirement.

Draft Rule C(a)(1)(B) would require an ETC applicant to submit a plan demonstrating how support will be used for upgrades and improvements to its network over its first two years as an ETC. Under Draft Rule D(a)(1), an ETC would be required to provide a progress report on its two-year plan as part of its annual certification filing. It is unclear from the Draft Rule whether the two-year plan is a rolling commitment, whether it requires ubiquitous build-out at the end of two years, or whether the planning and reporting obligation simply expires after two years.

The Draft Rule should clarify that the two-year plan is a rolling requirement. In other words, an ETC will be required to submit a new plan each year that contains a progress report and a plan for continued improvements and upgrades for the next two years. Without this clarification, the rule could be read to extinguish an ETC's expenditure reporting obligations after its first two years as an ETC, because the rule only makes reference to a carrier's initial two-year plan. Alternatively, the Draft Rule could be read contain an unlawful requirement that an ETC must build out its network ubiquitously within its first two years as an ETC. Such an interpretation would be unlawful because the operative federal statute does not require *any* ETC, including an ILEC, to construct facilities throughout 100% of its ETC service area within a specific period of time. On the contrary, a carrier may fulfill its obligation as an ETC in a service area by providing service "***either using its own facilities or a combination of its own facilities and resale of another carrier's services.***"[5]

[5] *See* 47 U.S.C. Section 214(e)(1). An ETC does not receive support for lines served entirely through resale. Accordingly, an ETC serving a customer solely via resale has a strong incentive to upgrade or expand its network so that it can transition that customer to facilities-based service as quickly as possible.

2. ETCs Should Be Permitted to Report at the County Level.

Any final rules adopted in this proceeding will be applicable to some ETCs or ETC applicants that provide service using wireless technology. Cellular and PCS operators are authorized to provide service in geographic areas determined by the FCC, including Rural Service Areas ("RSA"), Metropolitan Statistical Areas ("MSA"), and Basic Trading Areas ("BTA"). Yet the Draft Rule requires that the two-year plan describe improvements or upgrades "on a wire center-by-wire center basis".

Hargray submits that the use of a wireline-specific geographic area for reporting wireless infrastructure improvements would not be competitively neutral. Wireless carriers do not use wire centers when planning the type and location of facilities to be constructed or upgraded for the provision of wireless service. Assuming relatively flat terrain, a single cellular tower will provide roughly 100 square miles of signal coverage, an area that will generally stretch across several LEC wire centers. Additionally, whereas wire center boundaries are drawn around the households served at the end of a copper telephone wire, wireless service is provided over broad areas that are not reached by wireline facilities. To discuss wireless network improvements in terms of wire centers is to ignore the unique benefits of mobility and seamless coverage that are available to wireless customers.

As a more competitively neutral geographic reporting method, ETCs should be given the option of reporting network improvements by county instead of by wire center. RSAs, MSAs, and other licensed areas generally follow county lines. It is therefore significantly less burdensome for wireless carriers to plan, track and report by county. Hargray is aware that the Nebraska Public Service Commission recently proposed a rule that would allow wireless ETCs

to choose either wire centers or counties as the geographic basis for reporting ETC expenditures.[6]

Accordingly, Hargray proposes the following changes to the Draft Rule provisions concerning the two-year plan:

Hargray recommends changing Section C(a)(1)(B) to read as follows:

(B) submit a two-year plan that describes with specificity proposed improvements or upgrades to the applicant's network on a wire center-by-wire center or county-by-county basis throughout its proposed designated service area. Each applicant shall demonstrate how signal quality, coverage or capacity will improve due to the receipt of high-cost support throughout the area for which the ETC seeks designation; the projected start date and completion date for each improvement; the estimated amount of investment for each project that is funded by high-cost support; the specific geographic areas where the improvements will be made; and the estimated population that will be served as a result of the improvements. If an applicant believes that service improvements in a particular wire center or county are not needed, it must explain its basis for this determination and demonstrate how funding will otherwise be used to further the provision of supported services in that area. Upon designation, an ETC's two-year plan will be updated annually on a rolling basis as set forth in Section D(a)(1) of this Rule.

Additionally, Hargray suggests the following changes to Section D(a)(1):

(1) an updated two-year service quality improvement plan and a progress report on its previously filed two-year service quality improvement plan, including maps detailing its progress toward meeting its plan targets, an explanation of how much universal service support was received and how it was used to improve signal quality, coverage, or capacity, and an explanation regarding any network improvement targets that have not been fulfilled. The information ~~shall~~ may be submitted at the wire center level or at the county level.

[6] In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for the purpose of certifying the use of federal universal service support, Application No. NUSF-25, Order Seeking Comment, In the Matter of the Nebraska Public Service Commission, on its own motion, seeking to establish guidelines for the purpose of certifying the use of state universal service support, Application No. NUSF-66, Order Opening Docket and Seeking Comment (Feb. 6, 2007).

B. The Local Usage Comparability Requirement Should Incorporate the FCC's Total-Service Approach.

The Draft Rule again follows the FCC's rules by requiring competitive ETCs to offer a rate plan that is comparable to the local service offering of the incumbent LEC serving the same area. Hargray believes this requirement is generally fair, but that it contains an ambiguity that opens the door to unlawful rate regulation. Specifically, the rule suggests that a competitive ETC may be required to show that it offers a rate plan that matches a wireline carrier's rate plan by offering unlimited local usage, or by matching the artificially low monthly rates and small local calling areas offered by ILECs.

To be clear, the FCC did not define comparability to mean a CETC must create a rate plan to match the ILEC's service offering. Rather, it stated:

> We believe the [state] Commission should review an ETC applicant's local usage plans on a case-by-case basis. For example, an ETC applicant may offer a local calling plan that has a different calling area than the local exchange area provided by the LECs in the same region, or the applicant may propose a local calling plan that offers a specified number of free minutes of service within the local service area. We also can envision circumstances in which an ETC is offering an unlimited calling plan that bundles local minutes with long distance minutes. The applicant may also plan to provide unlimited free calls to government, social service, health facilities, educational institutions, and emergency numbers.[7]

Draft Rule section C(a)(4) would track the FCC's permissive guideline requiring an ETC petitioner to demonstrate that it offers "a local usage plan comparable to the one offered by the incumbent local exchange carrier in the areas for which the carrier seeks designation." However, the Draft Rule does not contain the FCC's discussion of what "comparable" means in this context. In adopting any rule, Hargray urges the Commission to make clear that "comparable" does not impose a requirement to replicate ILEC rate plans.

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[7] *FCC ETC Order, supra,* 20 FCC Rcd at 6385, para. 33 (footnotes omitted).

Under federal law, states cannot regulate rates of CMRS carriers, even if the CMRS carrier is an ETC.[8] Rate regulation has been interpreted broadly by the courts[9] and by the FCC.[10] Additionally, the *TOPUC* decision by the Fifth Circuit confirmed that Section 254(f) of the Act — which allows a state to "adopt regulations not inconsistent with the Commission's rules to preserve and advance universal service" — cannot be read to supersede the preemptive effect of Section 332(c)(3).[11] In sum, Congress made no "universal service exception" to its preemption of CMRS rate regulation.

Hargray submits that this is why the FCC decided to only require CETCs to have one rate plan that is comparable with that offered by ILECs. In so doing, the FCC did not mandate unlimited local usage or any particular rate structure, but left it open for each state to determine comparability on a case-by-case basis, taking into account local calling areas, price, and other

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[8] *See* 47 U.S.C. Section 332(c)(3); *Petition of the State Independent Alliance and the Independent Telecommunications Group for a Declaratory Ruling that the Basic Universal Service Offering Provided by Western Wireless in Kansas is Subject to Regulation as Local Exchange Service*, 17 FCC Rcd 14802, 14820, para. 33 (2002) ("*State Independent Alliance*") ("Kansas is precluded and preempted from imposing rate and entry regulations on Western Wireless' BUS offering, but Kansas may regulate other terms and conditions, and Kansas may impose universal service regulations that are not inconsistent with section 332(c)(3)(A), other provisions of the Act, and the Commission's regulations."). *See also WWC Holding Co., Inc. v. Sopkin et al.*, Civ. Action No. 04-cv-01682-RPM, ___ F.Supp. 2d ____, 2006 WL 581161 (D-Colo., Mar. 8, 2006) (concluding that a state commission's conditioning of ETC status on PUC approval of a wireless carrier's rate plans constituted preempted rate regulation).

[9] *See Cellco Partnership v. Hatch,* 431 F.3d 1077 (8th Cir. 2005)(holding Minnesota "Wireless Consumer Protection" Act preempted by 47 U.S.C. § 332(c)(3) as rate regulation); *Bastien v. AT&T Wireless Service, Inc.*, 205 F.3d 983, 989 (7th Cir. 2000). *See aso AT&T v. Central Office Telephone, Inc.*, 524 U.S. 214, 223 (1998) ("Rates. . . do not exist in isolation. They have meaning only when one knows the services to which they are attached. Any claim for excessive rates can be couched as a claim for inadequate services and vice versa. If 'discrimination in charges' does not include non-price features, then the carrier could defeat the broad purpose of the statute by the simple expedient of providing an additional benefit at no additional charge . . . An unreasonable 'discrimination in charges,' that is, can come in the form of a lower price for an equivalent service or in the form of an enhanced service for an equivalent price.") (internal quotations omitted).

[10] *See Southwestern Bell Mobile System, Inc., Memorandum Opinion and Order,* 14 FCC Rcd 19898, 19907, para. 20 (1999) ("[W]e find that the term 'rates charged' in Section 332(c)(3)(A) may include both rate levels and rate structures for CMRS and that the states are precluded from regulating either of these.") (emphasis in original).

[11] *See Texas Office of Pub. Util. Counsel v. FCC,* 183 F.3d 393, 431 (5th Cir. 1999), *cert denied,* 530 U.S. 1210, 1223 (2000), *and cert. dismissed,* 531 U.S. 975 (2000).

factors.[12]

Accordingly, the final rules should incorporate the FCC's case-by-case, total-service analysis discussed above, whether explicitly or by reference.

C. The Proposed Equal Access Requirement Should be Changed to Be Consistent with the FCC's Rule.

As currently drafted, proposed Section C(a)(5) states that a CMRS carrier will be automatically required to provide equal access in the event all other ETCs withdraw. However, the obligation to provide equal access is governed by federal law and can only be imposed by the FCC. Before a CMRS carrier can be required to provide equal access, Section 332(c)(8) of the Communications Act of 1934, as amended, requires *the FCC* to make a finding that "subscribers . . . are denied access to the provider of telephone toll services of the subscribers' choice, and that such denial is contrary to the public interest, convenience, and necessity[.]" 47 U.S.C. § 332(c)(8). Because states cannot mandate equal access by a wireless carrier, the appropriate course of action is to require carriers to acknowledge that they may be required to offer equal access if all other carriers withdraw from an area. This properly recognizes the FCC's role in following the procedures contained in Section 332 for determining whether equal access should be ordered.

We therefore propose bringing the equal access obligation into conformity with the rule adopted in the *FCC ETC Order*, which require an ETC to "certify that the carrier acknowledges that the [FCC] may require it to provide equal access to long distance carriers in the event that no other [ETC] is providing equal access within the service area."

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[12] *See FCC ETC Order, supra,* 20 FCC Rcd at 6385, para. 33.

III. CONCLUSION

Hargray urges the Commission to consider adopting competitively neutral standards to all ETCs, based largely on the FCC's guidelines as discussed herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Donna L. Brown, hereby certify that on this 21st day of February, 2007, copies of the foregoing **COMMENTS OF HARGRAY WIRELESS, LLC** was placed in the United States mail, via first class, postage prepaid to:

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